A

UNP PLYWOOD SDN BHD

v.

SABAH FOREST INDUSTRIES SDN BHD

B

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
TENGKU BAHARUDIN SHAH JCA
SULAIMAN DAUD JCA
[CIVIL APPEAL NO: S-02-261-2007]

C

27 FEBRUARY 2008

CONTRACT: *Breach - Damages - Licence to extract timber - Contract to extract timber between licencee and appellant - Whether an assignment - Whether illegal and void - Whether licence a licence agreement -*

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Whether assignment not prohibited by terms of licence - Whether appellant entitled to damages - Sabah Forest Enactment 1968, ss. 15, 24

The respondent had obtained a licence to extract timber from the State Government and by agreements had engaged the appellant

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to fell and extract the timber in question. Following disputes between the parties, the respondent terminated the agreements whereof the appellant filed an action for breach of contract and for damages against the respondent. The High Court ruled that the agreements were illegal and void, for reasons that they

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constituted an assignment of the licence which the Forest Enactment 1968 ('the Enactment') prohibited. The appellant appealed and argued that the agreements were not an assignment, and secondly that, even if it was, the purported licence, being in the nature of a licence agreement issued under s. 15 of the

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Enactment, did not render the agreements or the assignment unlawful. Defending the decision of the High Court as correct and sustainable in law, the respondent retorted that the licence was issued not under s. 15 but under s. 24 of the Enactment.

Held (allowing the appeal):

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Per Gopal Sri Ram JCA delivering the judgment of the court

(1) The agreements in the present case do not amount to an assignment. The respondent had merely conferred on the appellant the right to enter and extract and account for the

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timber to the respondent, without losing control over the felling of the timber. Whilst the appellant had a share in the

profits that does not mean that there was an assignment of the licence. The impugned agreements also made it clear that only 4.3%, and not the whole area covered by the licence, was made the subject matter of the agreements (*Lo Su Tsoon Timber Depot v. Southern Estate Sdn Bhd; Sundang Timber Co. Sdn Bhd v. Kinabatangan Development Co. Sdn Bhd (dist)*). (paras 6, 7 & 9)

(2) In any event, the licence issued to the respondent by the State does not prohibit assignment in any of its clauses. It is also pertinent to note that cl. 19 of the licence provides for an arbitration clause in the event of any dispute between the respondent and the Government. Such a provision is most unlikely to be found in a licence, and therefore there was much force in the appellant's contention that the licence was a licence agreement under s. 15 and not a licence issued under s. 24 of the Enactment as alleged by the respondent. (para 9)

(3) Section 15 of the Enactment, *vide* the second limb of its second subsection, specifically provides that a licence agreement is not to be treated as being inconsistent with the Enactment though its provisions conflict with those of the latter. In other words, a licence agreement may contain terms that are inconsistent with the provisions of the Enactment and yet remain valid. This clearly points to the superior status that the Enactment confers upon a licence agreement issued under s. 15. (para 11)

[Order of High Court set aside. Prayer (a) of statement of claim granted. Judgment entered in appellant's favour for damages to be assessed.]

Bahasa Malaysia *Translation Of Headnotes*

Responden memperoleh lesen mengeluarkan kayu balak dari Kerajaan Negeri dan melalui perjanjian telah mendapatkan khidmat perayu bagi mengeluarkan kayu kayan tersebut. Ekoran pertikaian yang wujud di antara mereka, responden menamatkan perjanjian dan berikutnya perayu memfail tuntutan kemungkiran kontrak dan gantirugi terhadap responden. Mahkamah Tinggi memutuskan bahawa perjanjian adalah tak sah dan batal, kerana ia merupakan satu serahanhak yang dilarang oleh Enakmen Hutan 1968 ('Enakmen'). Perayu merayu dan berhujah, pertama, bahawa

perjanjian bukan satu serahanhak, dan keduanya bahawa, jikapun ia satu serahanhak, lesen sebenarnya adalah satu perjanjian lesen yang dikeluarkan di bawah s. 15 Enakmen, sekaligus menjadikan perjanjian atau serahanhak di sini sah dan tidak terbatal. Dalam mempertahankan keputusan Mahkamah Tinggi sebagai sah dan betul di sisi undang-undang, responden berhujah bahawa lesen dikeluarkan di bawah s. 24 dan bukannya di bawah s. 15 Enakmen.

Diputuskan (membenarkan rayuan):

Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah

(1) Perjanjian di sini bukan merupakan serahanhak. Responden hanya memberi perayu hak untuk memasuki dan mengeluarkan kayu kayan bagi pihaknya, tetapi masih mengawal penebangan-penebangan yang dilakukan. Walaupun perayu berkongsi keuntungan yang diperolehi, itu tidak bermakna wujud serahanhak lesen kepada perayu. Selain itu, halperkara perjanjian yang dicabar hanya merangkumi 4.3% dan bukan keseluruhan kawasan yang diperuntukkan di dalam lesen (*Lo Su Tysoon Timber Depot v. Southern Estate Sdn Bhd; Sundang Timber Co. Sdn Bhd v. Kinabatangan Development Co. Sdn Bhd (dibezakan)*).

(2) Apapun, lesen yang dikeluarkan oleh Kerajaan Negeri dalam mana-mana fasalnya tidak melarang serahanhak. Adalah juga berkaitan untuk menyebut bahawa fasal 19 lesen bercakap mengenai pelaksanaan timbangtara sekiranya timbul pertikaian di antara responden dengan Kerajaan Negeri. Peruntukan sedemikian biasanya tidak wujud di dalam lesen, dan oleh itu terdapat kekuatan pada hujah perayu bahawa lesen bukannya lesen yang dikeluarkan di bawah s. 24 seperti yang didakwa oleh responden, tetapi adalah sebenarnya perjanjian lesen di bawah s. 15 Enakmen.

(3) Seksyen 15 Enakmen, melalui jejari kedua subseksyen duanya, memperuntukkan secara khusus bahawa satu perjanjian lesen tidak harus dianggap sebagai tidak konsisten dengan Enakmen walaupun peruntukan-peruntukannya bertentangan dengan Enakmen. Dengan kata lain, satu perjanjian lesen mungkin mengandungi terma-terma yang tidak konsisten dengan

peruntukan Enakmen tetapi masih tetap sah. Ini jelas menunjukkan status lebih tinggi yang diberikan oleh Enakmen kepada perjanjian lesen yang dikeluarkan di bawah s. 15.

[Perintah Mahkamah Tinggi diketepikan. Prayer (a) penyata tuntutan dibenarkan. Penghakiman dimasukkan untuk perayu untuk gantirugi yang akan ditaksir.]

Case(s) referred to:

Lo Su Tsoon Timber Depot v. Southern Estate Sdn Bhd [1971] 2 MLJ 161 ***(dist)***

Perkayuan OKS No 2 Sdn Bhd v. Kelantan State Economic Development Corp [1995] 1 CLJ 761 FC ***(refd)***

Sundang Timber Co Sdn Bhd v. Kinabatangan Development Co Sdn Bhd [1977] 2 MLJ 200 ***(dist)***

Legislation referred to:

Forest Enactment 1968, ss. 15, 24

Forest Rules 1969, r. 3

For the appellants - Marina Tiu (Nooraihan Mohammad Ali with her); M/s Yap Chin & Tiu

For the respondents - Norbert Yapp Chu Chon; M/s Jayasuriya Kah & Co

[Appeal from High Court, Kota Kinabalu; Civil Suit No: K22-55-1997]

Reported by Wan Sharif Wan Ahmad

JUDGMENT

Gopal Sri Ram JCA:

[1] This is the judgment of the court.

[2] This is a case in which the respondent was given a timber licence by the State Government.

[3] By two agreements dated 28 June 1993 and 13 August 1993 the respondent engaged the appellant to fell and extract timber from a certain portion of the land in the licence in question. Later the agreement was terminated and the appellant filed an action against the respondent for breach of contract. The learned judge who heard the suit dismissed it on the sole ground that the

two agreements aforementioned were illegal and void because it amounted to an assignment of the respondent's licence to the appellant which was prohibited by law.

[4] The respondent's case is that the licence in question was issued under s. 24 of the Forest Enactment 1968. For this contention the respondent relied on the following endorsement at the foot of the Timber Licence (see at p. 337 of vol. 2 of the record of appeal) as follows:

> In Witness Hereof, the Director for and on behalf of the Government of the State of Sabah and empowered by Section 4 and 24 of the Forest Enactment, 1968 has hereunder set his hand on this 26th day of Oct 1990.

[5] Under r. 3 of the Forest Rules 1969 a licence issued under s. 24 must be in Form I, Form IIA or Form IIB. The licence here is not in any of the said prescribed Forms. It is not correct to construe the timber licence as a s. 24 licence just because the Director says it is signed or issued under s. 24. We are therefore unable to agree with this contention of the respondent.

[6] We return now to the issue of assignment. The impugned agreements make it clear that only 4.3% of the whole area covered by the licence issued to the respondent was made the subject matter of the agreements. Further, cls. 2 and 6 of the agreement dated 28 June 1993 make it clear that the respondent retains control over the felling of the timber. As far as the power of attorney is concerned, this was executed simultaneously with the agreements and is merely an adjunct to enable the appellant to extract timber.

[7] Learned counsel for the respondent has submitted that the facts of the present case are indistinguishable from those of *Lo Su Tsoon Timber Depot v. Southern Estate Sdn. Bhd.* [1971] 2 MLJ 161 and *Sundang Timber Co. Sdn. Bhd. v. Kinabatangan Development Co. Sdn. Bhd.* [1977] 2 MLJ 200. With respect, we do not agree. In both those cases, the whole of the rights under the licence were assigned to the other party. Here the agreements do not do that. They merely confer on the appellant the right to enter, extract and account for the timber to the respondent. Of course, the appellant has a share in the profits but that does not mean that there was an assignment of the licence.

[8] In our judgment, the facts of this case are closer to those of *Perkayuan OKS No. 2 Sdn Bhd v. Kelantan State Economic Development Corp* [1995] 1 CLJ 761. In that case the Federal Court made the following observation about the fact pattern in that case:

> Upon examination of all the relevant provisions of the second agreement of 24 May 1988, we are compelled to depart from the finding of the learned judge below. From the preamble in paras (b) and (c), there is there stated the first indication as to the real intention of the parties. Because OKS No 2 (the appellant/plaintiff) 'is desirous of felling, logging and removing timber from that portion of the concession area', OKS No 2 'had agreed to engage' the contractor (Kempadang) to do the work subject to the terms and conditions in the agreement. The appellant/plaintiff agreed only 'to engage' Kempadang. To engage is to employ or to secure for service. By cl 1 of the said agreement, the contractor 'agrees to fell …' the timber 'subject to the reasonable satisfaction of OKS No 2 and in conformity with all the reasonable directions and requirements of OKS No 2 and …'. Upon being engaged to do the work, the contractor did not have a free hand to work the concession area. Kempadang not only must satisfy the appellant/plaintiff, it must also comply with all the directions and requirements issued by the appellant/plaintiff. To carry out the work with such conditions attached cannot be the result of an assignment. In any agreement of this kind, provisions as to indemnity there must be. (See cl 3(b)). By cl 8, the contractor is obliged to have the policies of insurance together with the receipts of premium paid ready at any reasonable time for inspection by the appellant/plaintiff. The appellant/plaintiff is entitled to terminate the 'employment of the contractor' if 'he fails to observe or perform and comply' with any of the provisions of this agreement or the main agreement (cl 10(ii)).

[9] So too here. We find that the agreements in the present instance do not amount to an assignment. In any event we would add that the licence issued to the respondent by the State does not prohibit assignment in any of its clauses. It is also pertinent to note that cl. 19 of the licence held by the respondent provides for an arbitration between itself and the Government in the event of any dispute. It is most unlikely to find such a provision in a licence. Arbitration clauses are normally found in contracts or agreements. Hence there is much force in the appellant's contention that the licence was a licence agreement under s. 15 and not a licence issued under s. 24 of the Enactment.

[10] Now, s. 15 of the Enactment provides as follows:

> (1) Save as otherwise provided in this Enactment and notwithstanding the provisions of any other State law, no right of any description in or over a Forest Reserve or any part thereof shall be acquired except by virtue, and in accordance with the terms of, a licence agreement entered into by the Minister with the approval of the Cabinet or of a licence.
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> (1A) A licence agreement entered into by the Minister under subsection (1) of this section may provide for the planting of forest or timber trees upon such terms and conditions as may be agreed.
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> (2) Any licence agreement entered into by the Minister under this section shall be subject to any admitted rights or conceded privileges and any special conditions attaching to the Forest Reserve concerned under the provisions of this Enactment, but subject thereto, where any provision of such licence agreement is inconsistent with any provision of this Enactment compliance with the provisions of such licence agreement shall be deemed to be compliance with the provisions of this Enactment:

[11] It is to be noted that s. 15 speaks of a licence agreement and not of a mere licence. And if you examine the licence issued to the respondent in the instant case, you will find that it is in the form of an agreement. Hence, the arbitration clause to which we have already referred. Further, it is of importance to note that s. 15 in the second limb of its second subsection specifically provides that a licence agreement is not to be treated as being inconsistent with the Enactment though its provisions conflict with those of the latter. In other words, a licence agreement may contain terms that are inconsistent with the provisions of the Enactment and yet remain valid. This clearly points to the superior status that the Enactment confers upon a licence agreement issued under s. 15.

[12] For the reasons already given this appeal is allowed. The order of the High Court is hereby set aside. We grant a declaration in terms of prayer (a) of the statement of claim. We also enter judgment in the appellant's favour for damages to be assessed and remit the case to the Deputy Registrar of the High Court at Kota Kinabalu for assessment of damages. We make no

order on the other prayers in the statement of claim. The respondent must pay the costs of this appeal and those in the court below. The deposit in court shall be refunded to the appellant.